

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

EVERARDO SILVA CEJA,	)	No. CV-F-08-1985 OWW
	)	(No. CR-F-03-5144 OWW)
)	
Petitioner,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER'S
vs.	)	MOTION TO VACATE, SET ASIDE
	)	OR CORRECT SENTENCE PURSUANT
	)	TO 28 U.S.C. § 2255 AND
UNITED STATES OF AMERICA,	)	DIRECTING CLERK OF COURT TO
	)	ENTER JUDGMENT FOR
	)	RESPONDENT
Respondent.)	
)	
)	

On December 30, 2008, Petitioner Everardo Silva Ceja, proceeding *in pro per*, timely filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

A. Background.

On April 3, 2003, Petitioner was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The Indictment alleged that:

defendant herein, on or about October 23, 2001, in the County of Fresno, State and Eastern District of California, after having

1 been previously convicted of Discharge of a
2 Firearm at an Occupied Vehicle, in violation
3 of California Penal Code Section 244, on or
4 about July 9, 1993, in the Superior Court of
5 California, County of Fresno, Case Number
6 486174-6; Felony Spousal Abuse, in violation
7 of California Penal Code Section 273.5, on or
8 about October 16, 1997, in the Superior Court
9 of California, County of Fresno, Case Number
10 581888-5; and, Felony Battery on a Peace
11 Officer, in violation of California Penal
12 Code Section 243(c), on or about December 19,
13 1998, in the Superior Court of California,
14 County of Fresno, Case Number 615118-7,
15 crimes punishable by a term of imprisonment
16 exceeding one year, did knowingly possess a
17 firearm, to wit: a Jennings, model 38, .380
18 caliber semiautomatic pistol, and Winchester
19 .380 caliber ammunition, in and affecting
20 commerce, in that said firearm and ammunition
21 had been shipped and transported in
22 interstate and foreign commerce, in violation
23 of Title 18, United States Code, Section
24 922(g) (1) .

13 Petitioner initially was represented by Thomas J.
14 Richardson. Anthony Capozzi was substituted as counsel of record
15 on June 30, 2003. While represented by Mr. Capozzi, Petitioner
16 pleaded guilty pursuant to a written Plea Agreement. The Plea
17 Agreement provided:

18 The defendant also gives up any right he may
19 have to bring a post-conviction attack on his
20 conviction or sentence. He specifically
21 agrees not to file a motion under 28 U.S.C. §
22 2255 or § 2241 attacking his conviction or
23 sentence.

22 The Plea Agreement specifically stated:

23 The defendant has read the charges against
24 him contained in the Indictment in this case,
25 and the charges have been fully explained to
26 him by counsel. Further, the defendant fully
understands the nature and elements of the
crimes [sic] with which he has been charged,
together with the possible defenses thereto,

1 and has discussed them with counsel.

2 The defendant understands that in order to
3 prove him guilty of the charge of being a
4 felon in possession of a firearm and
5 ammunition, the government must prove each of
6 the following elements beyond a reasonable
7 doubt:

8 First, the defendant knowingly possessed a
9 firearm or ammunition that had been shipped
10 or transported from one state to another;
11 and, Second, at the time the defendant
12 possessed the firearm or ammunition, the
13 defendant had been convicted of a crime
14 punishable by imprisonment for a term
15 exceeding one year.

16 The factual basis for Petitioner's guilty plea was set forth in
17 Exhibit A to the Plea Agreement:

18 On October 23, 2001, in the City of Fresno in
19 the State and Eastern District of California,
20 the defendant knowingly possessed a firearm,
21 to wit: a Jennings, model 38, .380 caliber
22 semiautomatic pistol, and Winchester .380
23 caliber ammunition, in and affecting
24 commerce, in that the firearm and ammunition
25 had been shipped and transported in
26 interstate and foreign commerce.

At the time that he possessed the firearm and
ammunition, the defendant had been previously
convicted of Discharge of a Firearm at an
Occupied Vehicle, in violation of California
Penal Code Section 246, on or about July 8,
1993, in the Superior Court of California,
County of Fresno, Case Number 486174-6;
Felony Spousal Abuse, in violation of
California Penal Code Section 273.5, on or
about October 16, 1997, in the Superior Court
of California, County of Fresno, Case Number
581888-5; and, Felony Battery on a Peace
Officer, in violation of California Penal
Code Section 243(c), on or about December 10,
1989, in the Superior Court of California,
County of Fresno, Case Number 615118-7, all
crimes punishable by a term of imprisonment
exceeding one year.

1 During the change of plea colloquy before Judge Robert E.
2 Coyle, Petitioner was placed under oath. In pertinent part, the
3 following occurred:

4 THE COURT: Mr. Rice, would you please set
5 forth the factual basis upon which the
6 defendant is pleading?

7 MR. RICE: Yes, Your Honor. The elements that
8 the government would have to prove in this
9 case would be the defendant knowingly
10 possessed a firearm or ammunition that had
11 been shipped or transported from one state to
12 another; and second, at the time the
13 defendant possessed the firearm or
14 ammunition, the defendant had been convicted
15 of a crime punishable by imprisonment for a
16 term exceeding one year.

17 To prove these elements the government would
18 introduce evidence that on October the 23rd,
19 2001, in the City of Fresno in the State and
20 Eastern District of California, the defendant
21 knowingly possessed a firearm, to wit: A
22 Jennings, model 38, .380 caliber
23 semiautomatic pistol, and Winchester 38
24 caliber ammunition, in and affecting
25 commerce, in that the firearm and ammunition
26 had been shipped and transported in
interstate or foreign commerce.

At the time that he possessed the firearm and
ammunition, he had previously been convicted
of discharging a firearm at an occupied
vehicle and violating the California Penal
Code Section 246 on or about July the 8th,
1993 in the Superior Court of California,
County of Fresno, case number 486174-6;
felony spousal abuse, in violation of
California Penal Code Section 273.5, on or
about October the 16th, 1997 in the Superior
Court of California, County of Fresno, case
number 581888-5; and felony battery on a
peace officer, in violation of California
Penal Code Section 243(c), on or about
December 10th, 1998, in the Superior Court of
California, County of Fresno, case number
615118-7, all crimes punishable by a term of
imprisonment exceeding one year.

1 THE COURT: Mr. Ceja, you understand that the
2 government would have to prove all of those
3 things as set forth by Mr. Rice beyond a
4 reasonable doubt?

5 THE DEFENDANT: Yes.

6 THE COURT: And remember that you're under
7 oath. Do you agree with all those facts as
8 set forth by Mr. Rice as to what you're
9 pleading guilty to?

10 THE DEFENDANT: Yes.

11 THE COURT: Ms. Clerk, please accept the plea.

12 MR. CAPOZZI: And judge for the record, if I
13 may first. The U.S. Attorney and I have
14 entered into an agreement that would allow us
15 - this case and this sentence is dependent
16 upon the number of convictions in the state
17 court. We have pulled those files in the
18 state court and we are now in the process of
19 filing writs to set aside those convictions.
20 Indeed, if just one is set aside, the
21 mandatory minimum is no longer 15 years.
22 We'll go by the guidelines. And indeed, if
23 all three are set aside, the case would be
24 dismissed.

25 The government has agreed to allow us the
26 opportunity to followup with those motions in
State court and allow us to continue out the
sentence to give us the time to get that
done. I just want to say that for the
record.

MR. RICE: That's correct. Basically I've
agreed to give Mr. Capozzi the time. The
only place that the priors can be litigated
at all is in State court because they're
State court convictions. And Mr. Capozzi
thinks that he has a good faith claim to set
aside one of those priors. He'll have to
bring it in State court. It would affect the
sentence in the event that one were crossed
out. But that's all that we're agreeing.

MR. CAPOZZI: We're pleading guilty.

THE COURT: All right. I understand. I just

1 want to be sure I understood or the record is
2 clear as to what the understanding is. Maybe
3 I misunderstood you, Mr. Capozzi. My
4 understanding of what you said is that if all
5 of these are set aside, this case would be
6 dismissed.

7
8 MR. CAPOZZI: I think the government would
9 agree with that.

10
11 MR. RICE: That's correct. If the State court
12 were to find that these were not valid prior
13 convictions and dismiss all those cases, then
14 the underlying felonies would go away.

15
16 THE COURT: All right. That's fine. I want
17 to make sure we're all on the same path.

18
19 MR. CAPOZZI: That's correct.

20
21 THE COURT: All right.

22
23 THE CLERK: Shall I take the plea?

24
25 MR. CAPOZZI: Yeah.

26
27 After entry of Petitioner's guilty plea, but before
28 sentencing, Roger Nuttall was substituted as counsel of record
29 for Petitioner.

30 On November 7, 2005, Mr. Nuttall, on behalf of Petitioner,
31 filed a motion to withdraw Petitioner's guilty plea on the ground
32 that Petitioner was factually innocent of violating Section
33 922(g)(1). (Doc. 46).¹ In relevant part, the motion to withdraw
34 the guilty plea asserted that "Current Counsel's investigation
35 has discovered facts which were apparently known to both of

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¹Mr. Nuttall also filed a motion to strike armed career criminal enhancement or, in the alternative, to withdraw guilty plea, which asserted that Petitioner's prior convictions were not qualifying felonies (Doc. 40). This motion was denied by oral ordered on November 16, 2005.

1 Defendant's prior counsel, but which were previously unsubmitted
2 to the court." Attached to the motion to withdraw the guilty
3 plea was the Declaration of Salvador Ceja:

4 1. I know that Everardo Silva Ceja did not
5 have knowledge that the .380 Caliber Jennings
6 handgun and bulletproof vest in question were
in the Grey Convertible Mustang on October
23, 2001;

7 2. Everardo and I (and others) periodically
8 borrowed the Grey Convertible Mustang from
its owner, for trips and special occasions;

9 3. When I borrowed the Mustang, I would not
10 perform an inventory search of the vehicle
for weapons and/or other illegal items;

11 4. On October 22, 2001, the night before
12 Everardo's arrest, I had borrowed said
Mustang, to entertain an acquaintance of
mine;

13 5. Said items belonged to this acquaintance
14 of mine, and were placed in said vehicle the
15 night before, in my presence, by said
acquaintance, and without Everardo's
knowledge;

16 6. Said other individual and I were the only
17 two people who knew that the handgun and vest
18 were in the Grey Convertible Mustang, and we
did not disclose this information to any
other person, including Everardo.

19 7. I am willing to meet with the Government
20 to disclose the identity of this
21 acquaintance, who hid handgun and vest in the
Mustang, and to whom said items belonged.

22 8. I told this information to both of
23 Everardo's prior attorneys, Thomas Richardson
and Anthony Capozzi.

24 Also attached to the motion to withdraw the guilty plea was
25 Petitioner's declaration:

26 1. On October 23, 2001, I was peacefully

1 arrested by the Fresno Police Department.
2 Without incident, I was handcuffed and
3 searched. The Police found the keys to a
4 Grey Convertible Mustang, which I had driven
5 to said location.

6
7 2. This Mustang was not my vehicle, and I
8 had borrowed it that day, from its owner.

9
10 3. I did not perform an inventory search of
11 this vehicle, and I was not aware that the
12 car contained a hidden .380 Caliber Jennings
13 handgun or bulletproof vest.

14 4. Without my consent or probable cause, the
15 Police officers searched the vehicle. When
16 the officers found said handgun, one of them
17 exclaimed, 'Bingo, A nice beautiful .380.'

18 5. Afterwards, I questioned the officers
19 about whether they were going to charge me
20 with possession of this handgun. They asked,
21 'Are you referring to the .22 caliber
22 pistol?' I responded, 'It's a .380,' because
23 I had heard the officers describe it as such.

24 Mr. Nuttall contended that "these new facts, directly contradict
25 the inference that Mr. Ceja possessed the requisite knowledge and
26 intent needed to establish a sufficient nexus between the
27 Defendant and the specific firearm involved in this case. (See,
28 e.g., U.S. v. Pahulu, (D.Utah, 2003) 274 F.Supp.2d 1235, 1240.)"

29 In opposing the motion to withdraw the guilty plea, the
30 United States presented investigation reports detailing the
31 Government's evidence against Petitioner: that agents saw
32 Petitioner, a wanted parolee, driving a car registered to his
33 father, Salvador Ceja, and his Petitioner's girlfriend, Zulema
34 Preciado; that agents saw Petitioner park the car at a
35 restaurant; that agents saw Petitioner's ex-girlfriend get out of
36 a Lincoln Navigator and meet Petitioner at his car; that an agent

1 saw Petitioner take off a dark garment and place it behind the
2 driver's seat; that an agent saw Petitioner remove an object from
3 his waist and put it in the console area of his car; and that
4 agents saw Petitioner and his ex-girlfriend enter the restaurant
5 and then leave the restaurant and return to their vehicles. The
6 agents then arrested Petitioner and found the keys to the vehicle
7 in Petitioner's pocket. The agents found a loaded .380 caliber
8 semiautomatic pistol between the driver's seat and console, a
9 bullet proof vest behind the driver's seat, and scales and drug
10 paraphernalia in the trunk. Petitioner asked the agents who is
11 going to be charged; when an agent said the .22 caliber handgun,
12 Petitioner spontaneously responded "that's a .380." Petitioner's
13 ex-girlfriend told the agents that when she met Petitioner at his
14 car, Petitioner took off the bullet proof vest and put it behind
15 the driver's seat; that Petitioner had the gun tucked in the
16 right side of the waist band of his pants; that she told
17 Petitioner she did not want him to bring the gun into the
18 restaurant and asked him why he wanted to bring it with him; that
19 Petitioner told her that people were after him and owed him
20 money; and that she saw Petitioner remove the gun from his
21 waistband and place it between the driver's seat and the console.
22 Attached to the Government's opposition is report prepared by the
23 Fresno County District Attorney, Bureau of Investigations,
24 Investigative Report executed by Investigator Tom Flanigan on
25 August 29, 2002, which stated:

26 In regard to the 2001 Ford Mustang, Cal. Lic.

1 #4TUJ279 (r/o Preciado, Zulema or Ceja,
2 Salvador, 1194 E. San Ramon, Fresno, CA.), I
3 was able to determine that registered owner
4 Preciado was the defendants [sic] girlfriend,
5 while Salvador Ceja is the defendants [sic]
6 father. I was able to determine that Zulema
7 Preciado had recently been residing at 5376
8 N. Valentine, #201, Fresno, however, she had
9 recently moved to an unknown location in
10 Sacramento. I was able to determine that Mr.
11 Salvador Ceja works for Attorney Thomas J.
12 Richardson at 2950 Mariposa Street in Fresno.
13

14 On 08/29/02, at 1300 hours, I contacted Mr.
15 Salvador Ceja at his business address. I
16 told Mr. Ceja that I wanted to ask him if his
17 son (defendant Everardo) had permission to
18 use the Mustang on 10/23/01, and also if Mr.
19 Salvador Ceja had any knowledge of the stolen
20 380 pistol which was found in the Mustang.
21 Mr. Salvador Ceja politely explained prior to
22 talking to me that he wished to confir [sic]
23 with his employer Mr. Richardson. I served
24 Mr. Salvador Ceja with a subpoena regarding
25 this case.

26 In the reply brief in support of the motion to withdraw the
guilty plea, Mr. Nuttall submitted another declaration by
Salvador Ceja:

1. That on or about August 29, 2002, I was
contacted by Fresno County District Attorney
Investigator Flanigan, who questioned me
concerning the activity of my son, Everardo
Silva Ceja, on or about October 23, 2001.
Specifically, he asked me if I had knowledge
of whether Everardo had permission to use the
Mustang, and whether I had knowledge of the
.380 pistol which had been found in said
Mustang.

2. That on that date, August 29, 2002, I did
have knowledge that Everardo did, have
permission to use the Mustang on October 23,
2001;

3. That on August 29, 2002, I did have
knowledge that the .380 caliber pistol, which
was found in the Mustang, did not belong to

1 Everardo, but in fact truly belonged to
2 another person, who had left said pistol in
the vehicle the night before;

3 4. That when Detective [sic] Flanigan
4 interviewed me, I asked to continue the
5 interview, so that I could confer with my
6 employer, and Everardo's attorney, Thomas J.
7 Richardson, Esq.;

8 5. That thereafter, I spoke with Mr.
9 Richardson concerning these matters, and Mr.
10 Richardson advised me that I should not
11 disclose this information to Investigator
Flanigan; and

12 6. That I have been willing to disclose this
13 information to the government, and that I
14 would have earlier disclosed this
15 information, but for the advice of Mr.
16 Richardson.

17 A hearing on this motion to withdraw Petitioner's guilty
18 plea was held on November 22, 2005 at which the following
19 occurred:

20 THE COURT: Have you now had sufficient time,
21 Mr. Nuttall, to confer with your client and
22 to enable him to determine what is in his
23 best interests?

24 MR. NUTTALL: Yes, I have. Just for the
25 record, Your Honor, I did, in that process, I
26 made a request. Since I came in late in the
case and made a request, actually yesterday,
to Mr. Rice to - concerning certain aspects
of the current charge that I was not clear
about. And I appreciate, he was very
responsive in light of the time frame here.
And I received that today and spent some time
with it. My advice to my client is that we
withdraw the motion to withdraw the plea. He
agrees with me. And so we do withdraw that
motion.

THE COURT: All right. Mr. Ceja, have you
heard the statements of your attorney, Mr.
Nuttall?

1 THE DEFENDANT: Yes.

2 THE COURT: And have you had a chance to
3 analyze this decision?

4 THE DEFENDANT: Yes.

5 THE COURT: And after having consulted with
6 your attorney, do you agree with his action
7 in determining that your motion to withdraw
8 your guilty plea in this case - because I
9 have said I would afford you a fair trial and
I'm certainly willing to provide you with a
jury trial, to determine whether or not these
elements of the crime can be proved beyond a
reasonable doubt - that it is in your best
interest to proceed to withdraw that motion?

10 THE DEFENDANT: Yes.

11 The Court then proceeded with sentencing. At sentencing,
12 Petitioner's mother, Endina Silva Garcia Ceja spoke:

13 MRS. CEJA: First of all, judge, thank you
14 very much for letting me speak. And second,
15 I would like to ask you to give me an
16 opportunity so that my son not be sentenced
because, in fact, he is not guilty. He had
no knowledge of the weapons that were in the
car. First of all, the car was not his.

17 And the first attorney we had, we tried to
18 explain that to him all the time, but he kept
19 saying that that was not necessary. He said
20 that that was not necessary, that he was
going to take care of everything without the
need to clarify things.

21 And also, please, I just don't want him to go
22 before a jury because I just don't trust that
23 system too much. And because first of all,
24 we're Hispanics and he has been to the point
25 where he was almost deported. And Mr. Thomas
26 Richardson, we kept telling him that all the
time. And that he was from here. And he
just doesn't listen to that because every
once in a while, he would ask us again, 'What
place in Mexico was your son born?' And that
just made no sense because we have known him
for quite a while.

1 THE COURT: Your son was born in the United
2 States and is a citizen of the United States.

3 MS. CEJA: Yes. And also, it's just that,
4 well, I'd like you to know, well, it's not
5 our fault. And I know you're not at fault
6 either because the first attorney that we had
7 for two years, he was not doing anything at
8 all. He was just lying to us. We didn't
9 discover that, you know, until two years
10 afterwards.

11 And then we hired the second attorney, Mr.
12 Anthony Capozzi, and he said, well, I'll take
13 care of everything in six or seven months.
14 And then it was almost a year. Time had gone
15 by. And then we talked to him, you know, as
16 to when he was going to take care of things.
17 Only just a few days we're going to take care
18 of things. And not until maybe another year
19 went by and nothing was done. Not until we
20 got this present attorney, the one who's
21 helping us out right now.

22 And also this present attorney, we've told
23 him that our son has nothing to do with it.
24 That my son, that he's not guilty of this.
25 That he didn't know anything about the gun or
26 anything else that was in the car. That he -
there's no reason that he should have to pay
for something that he did not do because he
didn't know anything about this.

And then - and then he said, well, he should
plead guilty - the - Mr. Capozzi said that,
he should, he said, and then I'll take care
of everything. But now that he pled guilty,
he's trapped. He's trapped into this and
something - for something he did not do.

And I just don't want for it to be the case
that maybe years later, we found out, okay,
well, now it comes out that he was innocent
because we know we have the evidence that he
had nothing to do with this at all.

Because we've tried to prove it to the other
two, the other two attorneys that we had,
that the weapons, that he had nothing to do
with that. Or anything to do with the car.
He had nothing to do with that.

1 And then the attorney, Roger Nuttall, he is
2 aware of all this and he did pay attention as
3 far as all this. Although he did tell us
4 from the beginning that he was very busy, but
5 that he was going to try and help us as best
6 he could.

7 And judge, I really appreciate your patience
8 as well as the District Attorney's [sic]
9 because I just don't want him to be
10 sentenced. I don't want him to go to a jury
11 - I mean, a trial before a jury because I
12 just don't want that. Because in the future,
13 if you find out that he's not guilty, also of
14 all the other cases in the past, that way we
15 were trying to avoid for him being sentenced
16 to like 15 years in prison. We're trying to
17 save him from all those things that he's
18 facing.

19 If it's possible that it can be done. I
20 believe it's in your hands.

21 ...

22 THE COURT: I will explain to you what my
23 understanding of the status of our
24 proceedings are so that you will know what
25 the law is.

26 I have offered to permit your son to have a
trial before a jury and I guarantee you it
will be a fair trial.

MRS. CEJA: Really, I just don't - I -
truthfully, I just don't want that because
what I have seen recently is that there's
some that they have been convicted by juries
and some that have even died and then it
comes out later that they were innocent. I
just don't want that.

THE COURT: I understand your concern. But I
believe that our jury would be representative
in this district. There would be Hispanic
individuals on our jury. And we would have a
fair trial.

The law concerning this matter of the
agreement that your son has made with the
government, and with regard to his prior

1 convictions, is one that has to be addressed
2 in the correct sequence. In other words, the
3 correct legal steps must be taken to attack,
4 if they can be legally attacked, his prior
5 convictions and that is something that cannot
6 start in this court. It has to start in the
7 courts where your son was convicted
8 originally. And those are state courts.
9 That is a different legal system from the
10 United States justice system. You are now in
11 a United States court.

12 The choice in this court is either an
13 agreement to accept responsibility and plead
14 to the crime, reserving all other legal
15 rights that exist, to try to attack the prior
16 convictions and to show any other basis for
17 upsetting the sentence that is recommended by
18 the probation officer and seems to be called
19 for under the law. Assuming the truth of the
20 charges.

21 Otherwise, the alternative is to test the
22 charges before a jury and to determine
23 whether the elements of those charges can be
24 proved beyond a reasonable doubt under the
25 law. And that right is available to your
26 son. And I will afford him that right and,
again, I state to you that the trial will be
fair.

And I can tell you that the prosecutor in
this case is an honest and an honorable man.
Your attorney is one of the best attorneys
who appear in this court and has the ability,
the wisdom, the experience to do his best for
your son in this case.

And so he, meaning your son, does have the
right and even though he's entered his plea,
I think there are enough circumstances
because it was a different attorney and
because the analysis that was presented that
I've seen in the lower courts does not
include everything that Mr. Nuttall has now
raised and apparently you and your son and
others of your family have provided. But I
can't comment on the merits of that because
that isn't before me today to decide. My
only alternative, as I have stated and I'll
state them again so you can understand, is

1 either we have a trial - Mr. Rice is ready to
2 have a trial. He will bring the evidence he
3 has and that evidence may be tested, may be
4 challenged. And then we would have a jury
5 decide the truth.

6 Or, if, as Mr. Nuttall has stated, to lower
7 the risk that your son faces because of the
8 prior convictions and because of the nature
9 of the offense charged in this case, he would
10 have at least a finite exposure, meaning he
11 would know what his sentence is going to be
12 and then he can take the steps that the law
13 provides he may take, through Mr. Nuttall, to
14 try to affect that result by either
15 overturning the State convictions or doing
16 whatever else would be available. And I
17 can't speak to that because I can't give
18 legal advice.

19 But those are really the choices that are
20 available unless Mr. Nuttall suggests
21 something else. And I don't see any other
22 alternatives. None have been suggested under
23 the law. Do you understand what I've said?

24 MRS. CEJA: Well, there are certain things
25 that I need to understand and there are
26 others that I would need more time for my
27 attorney - well, for the attorney to be able
28 to take more time to explain to me. But also
29 - but if you could give me more time, that
30 maybe until after the first or, you know,
31 after Christmas time, because, you know, that
32 way we can really be more conscious as to
33 what's going on. Because, you know, there's
34 just so many things going on right now, you
35 know, all these holidays that are coming up.
36 That way we could know exactly what we're
37 going to be doing.

38 THE COURT: Well, I don't know what else there
39 is to -

40 MR. NUTTALL: Let me, if I may, address. I
41 think what - what needs to be addressed. If
42 that would be all right.

43 THE COURT: Yes.

44 MR. NUTTALL: Your Honor, what they're talking

1 about - and just so the record is clear. I
2 appreciate the Court's comments here and
3 listening so attentively to Mrs. Ceja. Much
4 appreciated. We had talked - I'm aware - let
5 me make it clear.

6 For the record, we have withdrawn our motion
7 to withdraw the plea. We're not seeking a
8 trial. I appreciate the Court's indication
9 that we can have one. My advice to my client
10 is to proceed to sentencing.

11 Ultimately, at the time of sentencing today,
12 we're going to - I'd like to make a request
13 that the Court actually, once sentence is
14 imposed, stay imposition or execution or the
15 transfer for 90 to 150 days so that we can
16 facilitate the work that we need to do to
17 collaterally attack the prior convictions
18 without having to travel a great distance to
19 do that.

20 ...

21 THE COURT: I'd be willing to let Mr. Ceja
22 stay here while you pursued the habeas
23 remedies if the law permits it.

24 MR. NUTTALL: That would be fine. So I think
25 with that, we can proceed. We can have a bit
26 of time to work on that.

During the sentencing elocution, Petitioner stated:

THE DEFENDANT: I never signed for these 15
years. If Mr. Capozzi would have never
promised me that he was going to get some of
my priors -

THE COURT: Set aside.

THE DEFENDANT: Yeah. Because if I was truly
guilty, I would have accepted the four years
in the state, of course, and I would have
been home by now. So I didn't do that. And
Mr. Capozzi told me don't worry about it,
he'll have me out of here in six, seven
months. And that's the only reason I signed
for the 15.

THE COURT: All right. It sounds to me as if

1 we don't have a voluntary plea.

2 MR. RICE: It doesn't matter to me. If he
3 wants a trial, I'll give him a trial.

4 THE COURT: I'm - but I'm sufficiently
5 concerned that I think we're just inviting
6 catastrophe here, Mr. Nuttall. Mr. Ceja, you
7 know, says he's not guilty, that he was in
8 effect misled or simply did not understand
9 Mr. Capozzi's advice.

10 Mr. Capozzi - and it's being represented to
11 me, and it's said in his declaration, that he
12 would not face the sentence, the mandatory
13 minimum 15 year sentence in this court that
14 he is facing, and that he could - as I
15 interpret it, the language of Mr. Capozzi,
16 Mr. Ceja could be assured that one or more of
17 the priors were going to be set aside. And
18 that's the only reason he took this deal
19 because he didn't think he'd be doing any
20 time as his declaration says.

21 And so I think that under the totality of the
22 circumstances, that I - I know that we're in
23 the middle of sentencing, but I think we're
24 going to have to go back to your motion to
25 withdraw the plea because what I'm doing is
26 I've heard these rounds [sic] stated again by
27 your client. Now, Mr. Capozzi isn't here
28 obviously, but I sense that we would be, I
29 think, on legally firmer ground all around
30 here if we try this case. I don't really see
31 that we have an alternative.

32 THE DEFENDANT: I'm accepting the plea. I
33 just want the chance for Mr. Nuttall to fight
34 my State priors and have a chance to we can
35 talk before I get transferred.

36 THE COURT: Well, I've already said as long as
37 the law permits that, I'm -

38 THE DEFENDANT: That's all I want.

39 THE COURT: I'll permit you to stay here and
40 -

41 THE DEFENDANT: I just don't want to have to
42 get more than the 15 years.

1 THE COURT: I understand.

2 THE DEFENDANT: That's all I'm worried about.

3 MR. RICE: I guess that's really the problem.
4 If he does go to trial, I will seek 27 to 34
years.

5 THE COURT: Right. That's understood. We all
6 know that. But I just heard Mr. Ceja say
that he's accepting the plea.

7 MR. NUTTALL: Yes.

8 THE COURT: And so I want to be - I want to be
9 clear as to - because I don't want you to be
in the position, Mr. Ceja, where you think
10 that anybody's promised you anything and then
you don't get it and your going to feel
11 you've been betrayed.

12 THE DEFENDANT: Well, I feel ... confident
that Mr. Nuttall is going to take care -

13 THE COURT: He'll do the best he can. And he
14 certainly is a competent attorney. He has
the ability - if the law will support it and
15 the facts support it, he has the ability to
do the job.

16 All right. So you understand that if we go
17 forward with the sentencing now today and you
accept the plea, that that avenue is - unless
18 the higher court says that there's a basis to
set it aside or overturn it, that avenue will
19 be foreclosed. You understand?

20 THE DEFENDANT: Yeah.

21 THE COURT: And are you willing to proceed
today with sentencing? Is this your
22 voluntary choice, having been fully informed
by Mr. Nuttall as to the risks?

23 THE DEFENDANT: Yes.

24 THE COURT: All right. Do you wish to say
25 anything else, Mr. Ceja?

26 THE DEFENDANT: That's it. Thank you. Both
of you, Mr. Rice.

1 ...

2 THE COURT: ... All right. Is there any legal
3 cause why sentence should not now be
4 pronounced?

5 MR. NUTTALL: - no, Your Honor.

6 Petitioner was sentenced on November 22, 2005 to 180 months
7 incarceration and a 60 month term of supervised release. By
8 Orders filed on March 6, 2006, the transfer of Petitioner from
9 the Fresno County Jail to a Federal Institution was stayed
10 through April 28, 2006 while Petitioner's counsel collaterally
11 attacked Petitioner's prior state convictions.

12 Petitioner appealed his conviction and sentence and the
13 Ninth Circuit affirmed.²

14 B. GROUND FOR SECTION 2255 MOTION.

15 As grounds for relief, Petitioner asserts:

16 B. Petitioner for the first time in this
17 habeas corpus petition 28 U.S.C. § 2255 is
18 attacking his plea to the 'possession' of a
19 firearm charge on the ground that the plea
20 was not supported by an adequate factual
21 record. In this habeas corpus petitioner
22 claims factual and legal innocence. In
23 summary, petitioner posits that he was never
24 informed by Judge Coyle, at the plea hearing,
25 that it was an essential element of the
26 offense that petitioner must have had
27 knowledge of the presence of the weapon prior
28 to or during the possession in order to
29 satisfy the element of the offense.

30 ²In the Plea Agreement Petitioner waived his right to appeal
31 as long as his sentence was consistent with the agreement.
32 Although Petitioner was sentenced in accordance with the Plea
33 Agreement, Mr. Nuttall requested and Mr. Rice agreed that
34 Petitioner could appeal whether the three prior convictions
35 constitute categorical crimes of violence within the meaning of the
36 armed career criminal enhancement.

1 C. Petitioner, therefore, argues that the
2 hearing court did not adequately advise him
3 of the exact nature of the § 924(e) charge,
4 the guilty plea was not knowing and voluntary
5 was required by due process, and the hearing
6 court did not have a legally sufficient
7 factual basis for accepting the guilty plea.

8 D. Petitioner was unaware of the presence of
9 a weapon at any stage of which the offense
10 conduct was based. His knowledge of the
11 presence of the weapon was not until after
12 his arrest. Petitioner in deciding to plead
13 guilty did so with the (incorrect)
14 understanding that he was guilty of the
15 offense, by simply being in the borrowed
16 vehicle that he was driving on the day of his
17 arrest. Thus, he was pleading guilty and
18 simultaneously denying culpability. The
19 record will conclusively demonstrate same.
20 (See Exhibit 'E' pg. 17 [Transcript of
21 November 22, 2005 hearing on Petitioner's
22 motion to withdraw guilty plea and
23 sentencing]).

24 Petitioner contends that his guilty plea to possession of the
25 firearm was not knowing, intelligent, and voluntary "because: (1)
26 He was misinformed as to the factual basis for a § 924(e) (1)
violation, and (2) He was hobbled by the ineffective assistance
of counsel, Thomas J. Richardson and Anthony Capozzi during
pretrial proceeding; during plea negotiations and at the plea
hearing."

Petitioner's motion is supported by the Declaration of
Salvador Ceja executed on December 12, 2008:

[O]n October 23, 2001 Everardo Silva Ceja did
not had [sic] any knowledge that the .380
caliber Jennings handgun and bulletproof vest
in question were in the Grey Convertible Ford
Mustang he had borrowed in [sic] that day of
his arrest. I Salvador Ceja and Efren Gayton
had the gun in the car and we were the only
two persons who knew about the gun in

1 question being in the vehicle because Efren
2 put it there on October 22, 2001 in my
3 presence the night before Everardo's arrest
4 because we were working together that
5 evening. The night before Everardo's arrest
6 I, Salvador Ceja was driving the said Ford
7 Mustang because I was performing a very, very
8 dangerous investigation for the government
9 and for that reason it was very important for
10 our own safety to have the gun with us. I
11 know that it is against the law to carry an
12 unregistered weapon, but in this case I
13 decided to take the risk to be punished by
14 the law for carrying an unregistered gun
15 rather than being murdered by those outlaws
16 [sic] members of the Millenium [sic] Drug
17 Cartel. Fortunately I was not punished, I
18 was not murdered either, but yes, I was
19 seriously hurt by the government for
20 punishing a member of my family without
21 having any fault. The investigation that I
22 was performing for the government was
23 regarding a homicide of four people in
24 Chicago, Illinois in which Efren's brother
25 Jose Luis Gayton who was also my godson was
26 one of the victims who was brutally murdered
there. I worked in this investigation for
approximately 3 years until I discovered
those who were the persons in charge in
committing this horrible crime. The persons
in charge were the most fearsome and
bloodthirsty gunmen of the most dangerous
drug cartel in Mexico. 'The Millenium [sic]
Drug Cartel of the Valencia Brothers.' I
gave this information to all three of
Everardo's prior attorneys, Thomas J.
Richardson, Anthony Capozzi and Mr. Roger T.
Nuttall. At the evidentiary hearing I will
take this same information to the judge but
with all the proofs to demonstrate that what
I declare here is true. Furthermore, I tried
to speak with the prosecutor by means of Mr.
Roger T. Nuttall to clarify as to who put the
gun in the car in [sic] October 22 [sic],
2001, and who knew that the gun was there.
Unfortunately all my attempts were useless
because the prosecutor refused to speak to me
because according to him I was not credible.
I do not explain myself as to why the
prosecutor could judge me before speaking
with me. I cannot believe that he said that

1 my declaration was lacking of [sic]
 2 credibility, without earlier knowing if it is
 3 truth or not about what I wanted to speak
 4 about. But at the evidentiary hearing I am
 5 going to present indisputable evidence to
 6 prove that my declaration does not lack
 7 credibility. Finally, I look forward to
 8 meeting with the prosecutor and or any
 9 government Agent of his choice for
 10 questioning regarding the gun in question
 11 from the October 23, 2201 incident in which
 12 an innocent person was wrongfully condemned
 13 for a crime that he did not commit. I am
 14 ready for any questioner. For more details
 15 with regard to my declaration you can contact
 16 FPD Detective Carlos Leal at (559) 696-1656
 17 and, or [sic] FBI Agent Sunny Santiago at
 18 (559) 436-4474. They will provide the
 19 necessary evidence to show that my
 20 declaration is credible.

11 1. Failure to Comply with Rule 11.

12 "To establish a violation of § 922(g)(1), the government
 13 must prove three elements beyond a reasonable doubt: (1) that the
 14 defendant was a convicted felon; (2) that the defendant was in
 15 knowing possession of a firearm; and (3) that the firearm was in
 16 or affecting interstate commerce." *United States v. Beasley*, 346
 17 F.3d 930, 934 (9th Cir.2003), *cert. denied*, 542 U.S. 921 (2004).

18 "To establish that a defendant acted 'knowingly,' the prosecution
 19 need not prove that the defendant knew that his possession of a
 20 firearm was unlawful; the prosecution need only prove that the
 21 defendant consciously possessed what he knew to be a firearm."

22 *Id.*

23 Rule 11(b)(1)(G), Federal Rules of Criminal Procedure,
 24 provides that, during the change of plea colloquy, the Court must
 25 advise the defendant of "the nature of the charge to which the
 26

1 defendant is pleading." Rule 11(b)(3) requires that, "[b]efore
2 entering judgment on a guilty plea, the court must determine that
3 there is a factual basis for the plea."

4 "For a section 2255 movant to successfully challenge a
5 guilty plea based upon a violation of Rule 11, he must establish
6 that the violation amounted to a jurisdictional or constitutional
7 error or that the violation resulted in a complete miscarriage of
8 justice or in a proceeding inconsistent with the demands of fair
9 procedure." *United States v. Grewal*, 825 F.2d 220, 222 (9th
10 Cir.1987); *United States v. Timmreck*, 441 U.S. 780, 783-785
11 (1979) (technical violations of Rule 11 will not support
12 collateral relief). "He must also establish that he was
13 prejudiced in that he was unaware of the consequences of his
14 plea, and, if properly advised, would not have pleaded guilty."
15 *Id.*

16 Assuming *arguendo* that the Rule 11 colloquy did not satisfy
17 the requirements of Rule 11(b)(1)(G) and (b)(3), Petitioner
18 cannot establish that, had he known that knowing possession of a
19 firearm required proof that he consciously possessed what he knew
20 to be a firearm, he would not have pleaded guilty. Mr. Nuttall
21 moved to withdraw the guilty plea based on Petitioner's
22 contention that he did not know the weapon was in the vehicle,
23 presented declarations in support of that contention, and that he
24 was actually innocent of violating Section 922(g). The motion to
25 withdraw the guilty plea was fully briefed and set for hearing.
26 Petitioner withdrew the motion to withdraw the guilty plea

1 despite repeated assurances from the United States and the Court
2 that Petitioner could withdraw his guilty plea and proceed to
3 trial. The Court twice offered the opportunity to Petitioner to
4 proceed to trial based on his claim that he did not knowingly
5 possess the firearm. At the sentencing hearing, Petitioner's
6 mother again asserted that Petitioner did not know the gun was in
7 the car and, again, the Court and the United States advised
8 Petitioner he would then be allowed to withdraw the guilty plea
9 and proceed to trial. Petitioner stated that he did not want to
10 undergo the risk of trial and insisted on maintaining his guilty
11 plea.

12 2. Ineffective Assistance of Counsel.

13 Petitioner contends that he was denied the effective
14 assistance of counsel because of counsel's failure to advise him
15 that proof of knowing possession for purposes of Section 922(g)
16 required proof that he consciously possessed what he knew to be a
17 firearm.

18 To establish an ineffective assistance of counsel claim,
19 Petitioner must show: (1) the representation was deficient,
20 falling "below an objective standard of reasonableness"; and (2)
21 the deficient performance prejudiced the defense. *Strickland v.*
22 *Washington*, 466 U.S. 668, 687 (1984). The Court need not
23 evaluate both prongs of the *Strickland* test if the petitioner
24 fails to establish one or the other. *Strickland, id.* at 697;
25 *Thomas v. Borg*, 159 F.3d 1147, 1152 (9th Cir.1998), cert. denied,
26 526 U.S. 1055 (1999).

1 Under the first prong, Petitioner must show that "counsel
2 made errors so serious that counsel was not functioning as the
3 'counsel' guaranteed the defendant by the Sixth Amendment."
4 *Strickland*, 466 U.S. at 687. "A convicted defendant making a
5 claim of ineffective assistance must identify the acts or
6 omissions of counsel that are alleged not to have been the result
7 of reasonable professional judgment." *Id.* at 690. "A fair
8 assessment of attorney performance requires that every effort be
9 made to eliminate the distorting effects of hindsight, to
10 reconstruct the circumstances of counsel's challenged conduct,
11 and to evaluate the conduct of counsel's performance at the
12 time." *Id.* at 689. The proper inquiry is whether, "in light of
13 all the circumstances, the identified acts or omissions were
14 outside the wide range of professionally competent assistance."
15 *Id.* The court must apply "a heavy measure of deference to
16 counsel's judgments," and "must indulge a strong presumption that
17 counsel's conduct [fell] within the wide range of reasonable
18 professional assistance." *Id.* at 690-691. "The relevant inquiry
19 under *Strickland* is not what defense counsel could have pursued,
20 but rather whether the choices made by defense counsel were
21 reasonable." *Siripongs v. Calderon*, 133 F.3d 732, 736 (9th
22 Cir.1988). "The failure to raise a meritless legal argument does
23 not constitute ineffective assistance of counsel." *Shah v.*
24 *United States*, 878 F.2d 1156, 1162 (9th Cir.1989). A decision to
25 waive an issue where there is little or no likelihood of success
26 and concentrate on other issues is indicative of competence, not

1 ineffectiveness. See *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th
2 Cir.1989).

3 To meet the prejudice requirement, the petitioner must
4 demonstrate that errors "actually had an adverse effect on the
5 defense." *Strickland*, 466 U.S. at 693. "It is [also] not enough
6 for the defendant to show that the errors had some conceivable
7 effect on the outcome of the proceeding." *Id.* "Virtually every
8 act or omission of counsel would meet that test, and not every
9 error that conceivably could have influenced the outcome
10 undermines the reliability of the result of the proceeding." *Id.*
11 "The defendant must show that there is a reasonable probability
12 that, but for counsel's unprofessional errors, the result of the
13 proceeding would have been different. A reasonable probability
14 is a probability sufficient to undermine confidence in the
15 outcome. *Id.* at 694. Where a petitioner enters a guilty plea
16 upon the advice of counsel, the voluntariness of the plea depends
17 upon whether the petitioner received effective assistance of
18 counsel. In order to prevail on an ineffective assistance of
19 counsel claim, "the [petitioner] must show that there is a
20 reasonable probability that, but for counsel's errors, he would
21 not have pleaded guilty and would have insisted on going to
22 trial." *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985).

23 Petitioner's claim of ineffective assistance of counsel
24 fails on the prejudice prong. Petitioner cannot demonstrate
25 that, but for counsel's errors, he would not have pleaded guilty
26 and would have insisted on going to trial. Mr. Nuttall moved to

1 withdraw the guilty plea based on Petitioner's contention that he
2 did not know the weapon was in the vehicle, presented
3 declarations in support of that contention, and argued that
4 Petitioner was actually innocent of violating Section 922(g).
5 The motion to withdraw the guilty plea was fully briefed and set
6 for hearing. Counsel properly presented the facts that supported
7 his alleged claim of actual innocence. Based on this proffer,
8 the Court offered to set aside the plea and proceed to trial.
9 Petitioner withdrew the motion to withdraw the guilty plea,
10 despite repeated assurances from the United States and the Court
11 that Petitioner's motion to withdraw his guilty plea would be
12 granted and he could proceed to trial. At the sentencing
13 hearing, Petitioner's mother again asserted that Petitioner did
14 not know the gun was in the car and, again, the Court and the
15 United States stated that Petitioner would be allowed to withdraw
16 the guilty plea and proceed to trial. Petitioner then stated in
17 open court that he accepted the guilty plea.³

18 CONCLUSION

19 For the reasons stated:

20 1. Petitioner Everardo Silva Ceja's motion to vacate, set

21
22 ³Petitioner's motion contains a lengthy discussion of the
23 sufficiency of the Government's evidence, including claims that one
24 of the police reports was fabricated, and of his father's
25 declaration and demands an evidentiary hearing on the issue of his
26 actual innocence. Petitioner's discussion of the sufficiency of
the Government's evidence is irrelevant to the resolution of his
Section 2255 motion because Petitioner pleaded guilty and cannot
demonstrate a basis for setting aside his guilty plea through his
Section 2255 motion. For the same reason, Petitioner is not
entitled to an evidentiary hearing.

1 **aside or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED;**

2 **2. The Clerk of the Court is directed to ENTER JUDGMENT FOR**
3 **RESPONDENT.**

4 IT IS SO ORDERED.

5 **Dated: January 9, 2009**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE